

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WADE MOREHOUSE,) CASE NO. C12-5375-MJP-MAT
Plaintiff,)
v.)
MICHAEL J. ASTRUE, Commissioner) REPORT AND RECOMMENDATION
of Social Security,) RE: SOCIAL SECURITY
Defendant.) DISABILITY APPEAL
)
)

Plaintiff Wade Morehouse proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1964.¹ He completed 11th grade, has a GED, and previously worked as a cook. (AR 229-236.)

Plaintiff filed applications for DIB and SSI on January 22, 2008. (See AR 188-193.) Those applications were denied initially and on reconsideration, and Plaintiff timely requested a hearing. (AR 101-104, 116-121, 129-30.)

On June 9, 2010, ALJ M.J. Adams held a hearing, taking testimony from Plaintiff and a vocational expert. (AR 50-90.) On July 29, 2010, the ALJ issued a decision finding Plaintiff not disabled. (AR 25-43.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on March 8, 2012 (AR 1-3), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff not engaged in substantial gainful activity since April 27, 2004, the alleged onset date. (AR 27.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found Plaintiff's depression, anxiety disorder, right wrist crush injury status post

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 deQuervain's release, and migraine headaches to be severe, and Plaintiff's burn injuries to be
02 not severe. (AR 28-29.) Step three asks whether a claimant's impairments meet or equal a
03 listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the
04 criteria of a listed impairment. (AR 29-30.)

05 If a claimant's impairments do not meet or equal a listing, the Commissioner must
06 assess residual functional capacity (RFC) and determine at step four whether the claimant has
07 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
08 performing light work "as defined by 20 C.F.R. 401.1567(b) and 416.967(b)," including the
09 ability to lift and/or carry 20 pounds occasionally and 10 pounds frequently, to stand, walk, or
10 sit walk (with normal breaks) for a total of about six hours each in an eight-hour workday, and
11 the ability to frequently climb ramps and stairs, balance, stoop, kneel and crouch. (AR 31.)
12 Plaintiff also has the ability to occasionally crawl and climb ladders, ropes, and scaffolds, and
13 can frequently handle with his right wrist. Plaintiff should avoid concentrated exposure to
14 extreme heat and hazards (machinery, heights, etc.). As to mental limitations, the ALJ found
15 that Plaintiff can understand, remember, and carry out simple 2-3 step instructions required of
16 skilled work, and has the "average ability" to perform sustained work activities in an ordinary
17 work setting on a regular and continuing basis within customary tolerances of employers'
18 rules regarding sick leave and absences. (AR 31.) Plaintiff can make judgments on simple
19 work-related decisions, respond appropriately to supervision, co-workers, and deal with
20 changes in a stable work environment not dealing with the general public or where the general
21 public is not frequently encountered as an essential element of the work process (i.e.,
22 incidental contact with the general public is not precluded). (AR 31.)

01 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
 02 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
 03 an adjustment to work that exists in significant levels in the national economy. Considering
 04 the Medical-Vocational Guidelines and with the assistance of the vocational expert, the ALJ
 05 found Plaintiff capable of performing other jobs, such as fast food worker, cleaner
 06 (housekeeping), and garment sorter. (AR 43.)

07 This Court's review of the ALJ's decision is limited to whether the decision is in
 08 accordance with the law and the findings supported by substantial evidence in the record as a
 09 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
 10 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
 11 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
 12 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
 13 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
 14 F.3d 947, 954 (9th Cir. 2002).

15 Plaintiff argues² the ALJ erred by (1) discounting Plaintiff's credibility; (2)
 16 discounting the medical opinions of Dr. Thomas Dean, Dr. Jennifer Cheng-Shannon, Dr.
 17

18 ² After listing the specific assignments of error at page one of his Opening Brief, Plaintiff
 19 devotes approximately half of the remaining pages to a lengthy narrative of the medical opinion
 20 evidence before commencing an actual discussion of the issues presented. The Court has full access to
 21 the administrative record and all the hearing exhibits. A lengthy summary of the record by either party
 22 serves no useful function, and violates this Court's scheduling order. (Dkt. 7 at 2 ("The parties shall
 not include a lengthy recitation of background facts or medical evidence. Rather, a discussion of
 the relevant facts should be included in the context of specific assignments of error.") (emphasis
 in original).) Further, Plaintiff's counsel is cautioned that all pleadings must conform with Local Rule
 W.D. Wash. CR 10(e)(3), requiring the name of the law firm (if any), mailing address, and telephone
 number of the attorney or party preparing the pleading to be printed or typed at the right side of the
 bottom of each page.

01 Jeffrey Bremer, Dr. Silverio Arenas, and Dr. Srinivaska Meka, and failing to account for all
 02 the limitations identified by State agency consultants; (3) discounting lay witness testimony;
 03 and (4) failing to meet the Commissioner's burden at step five. The Commissioner argues
 04 that the ALJ's decision is supported by substantial evidence and should be affirmed.³

05 **Plaintiff's Credibility**

06 The ALJ's reasons for discounting the credibility of Plaintiff's self-reported symptoms
 07 fall into three categories: (1) inconsistency between Plaintiff's self-report and the medical
 08 record; (2) inconsistency in Plaintiff's reporting symptoms, drug use, and work history; and
 09 (3) inconsistency between Plaintiff's self-report and Plaintiff's activities. Plaintiff contends
 10 that none of these reasons were clear and convincing.⁴

11 **Legal Standards**

12 In assessing credibility, an ALJ must first determine whether a claimant presents
 13 "objective medical evidence of an underlying impairment 'which could reasonably be
 14 expected to produce the pain or other symptoms alleged.'" *Lingenfelter v. Astrue*, 504 F.3d
 15 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)).

16 ³ Although the Commissioner's brief addresses the sufficiency of the ALJ's consideration of
 17 Plaintiff's impairments in combination at step three of the sequential evaluation, Plaintiff does not
 18 assign error to the ALJ's step-three findings. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328
 F.3d 1145, 1164 (9th Cir. 2003) (nothing that courts "ordinarily will not consider matters on appeal
 that are not specifically and distinctly argued in an appellant's opening brief").

19 ⁴ Plaintiff also makes a passing reference to the ALJ's duty to develop the record, in his Reply
 20 brief. Dkt. 25 at 1-2. Plaintiff does not, however, show that any of the evidence in the record was
 21 ambiguous or inadequate, but instead implies that because the ALJ identified inconsistencies in the
 22 record, the ALJ should have further inquired into those topics. But it is ambiguity or inadequacy —
 not inconsistency — that triggers an ALJ's duty to further develop the record. *See Mayes v.
 Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) ("An ALJ's duty to develop the record further is
 triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper
 evaluation of the evidence.").

01 Given presentation of such evidence, and absent evidence of malingering, an ALJ must
 02 provide clear and convincing reasons to reject a claimant's testimony. *Id.* See also *Vertigan*
 03 v. *Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).

04 Inconsistency with the Medical Record

05 The ALJ reasoned that because Plaintiff sought only sporadic treatment for his right
 06 arm pain, and did not consistently comply with the recommended treatment for his headaches,
 07 those physical complaints were not as debilitating as Plaintiff claimed. (AR 34.) As to
 08 Plaintiff's mental conditions, the ALJ discounted their severity because Plaintiff's symptoms
 09 stabilized on medication and because Plaintiff performed satisfactorily on mental-status
 10 examinations. (AR 34-35.)

11 The ALJ did not, as Plaintiff contends, find that the medical evidence *does not support*
 12 Plaintiff's self-report of disabling pain in his right hand and wrist, knees, left shoulder, mid
 13 back and head; the ALJ found that the medical record *contradicts* Plaintiff's self-report.
 14 Specifically, the ALJ pointed to January 2005 testing revealing moderate loss of range of
 15 motion in his hand and wrist, but no loss of sensation, with physical therapy recommended as
 16 treatment. (AR 32 (citing AR 446-47).) The ALJ also pointed to Plaintiff's failure to pursue
 17 physical therapy to the extent recommended, and his failure to report significant hand, wrist,
 18 or arm pain when he received medical treatment in February 2006. (AR 33 (citing AR 438-
 19 43).) The ALJ also identified other testing performed in April 2007 that revealed some wrist
 20 tenderness, but normal strength and sensation throughout the extremities. (AR 33 (citing AR
 21 384).) The ALJ further noted that in September 2007, Plaintiff reported to his primary care
 22 physician that his back pain was well-controlled, denied any history of tingling, numbness, or

01 unusual pain in his extremities, and denied all complaints other than headaches. (AR 33-34
02 (citing AR 531-33).)

03 Regarding Plaintiff's headaches, the ALJ noted that though Dr. Gregory Bell
04 prescribed Depakote for headaches and recommended occipital nerve blocks and cervical
05 paraspinous muscle trigger point injections, Plaintiff did not follow these treatment
06 recommendations. (AR 33 (citing AR 529).) Similarly, Dr. Jon Kooiker prescribed
07 Verapamil in August 2008 for Plaintiff after a neurological evaluation, but "there is no
08 indication that the claimant followed through with the prescription." (AR 34 (citing AR 537-
09 38).)

10 The ALJ also pointed to evidence that Plaintiff reported in July 2005 and again in
11 January 2008 that his mental-health symptoms were well-controlled when he took Prozac, yet
12 reported depression in May 2008 after he discontinued treatment. (AR 34-35 (citing AR 430,
13 520, 528-29, 530-32).) He started another course of Prozac in September 2008, but then
14 reported in June 2009 that he was experiencing depression symptoms and had been off Prozac
15 for four months. (AR 35 (citing AR 548).)

16 The cited evidence does not merely fail to corroborate Plaintiff's self-described
17 symptoms, but instead contradicts them or shows that they can be controlled with treatment,
18 and therefore undermines the credibility of Plaintiff's complaints of disabling symptoms. *See*
19 *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 599-600 (9th Cir. 1999) (holding that
20 an ALJ was entitled to discount a claimant's credibility after identifying specific evidence in
21 the record that undermined the claimant's testimony). Furthermore, contradiction with the
22 medical record is an appropriate basis for rejecting the claimant's subjective testimony where,

01 as here, the ALJ also identified other legally sufficient reasons for discounting Plaintiff's
 02 testimony. *Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008)
 03 (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)). *See also Rollins v.*
 04 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("While subjective pain testimony cannot be
 05 rejected on the sole ground that it is not fully corroborated by objective medical evidence, the
 06 medical evidence is still a relevant factor in determining the severity of the claimant's pain
 07 and its disabling effects.").

08 Inconsistency in Plaintiff's Report to Medical Providers

09 The ALJ noted inconsistencies in Plaintiff's reporting of drug use and work history to
 10 his medical providers. For example, Plaintiff admitted to a history of alcohol abuse and
 11 current marijuana use in April 2007 and June 2008 consultative examinations and at the
 12 administrative hearing, but denied current marijuana use at an October 2007 psychological
 13 evaluation and in a June 2008 form. (AR 36-37 (citing AR 382, 389, 422-23, 462, 510).) The
 14 ALJ noted that Plaintiff reported in September 2008 that he had not used cocaine for 20 years
 15 or methamphetamine for seven or eight years, which contradicted an April 2006 toxicology
 16 screen that was positive for opiates, benzodiazepines, and methamphetamine. (AR 36-37
 17 (citing AR 338-39, 495).)

18 The ALJ further described other inconsistencies in Plaintiff's mental-health records.
 19 In September 2007 Plaintiff told his primary care physician that he had never attempted
 20 suicide, but reported in July 2008 that he had been suicidal several times and attempted once
 21 via overdose. (AR 37 (citing AR 531).) In September 2008 he reported that five years earlier
 22 he had overdosed on sleep medication, but denied that this was a suicide attempt. (AR 494.)

01 The ALJ also noted that Plaintiff had reported that he could not remember his birthday
02 but could interpret a proverb in April 2007, yet could remember his birthday but not interpret
03 the same proverb in April 2008. (AR 37 (citing AR 466-469).)

04 Last, the ALJ pointed out discrepancies in the way Plaintiff described the
05 circumstances that caused various symptoms, and how those symptoms affected his ability to
06 work. (AR 37 (citing AR 201-209, 464-65, 495, 517).) In April 2008, Plaintiff reported that
07 his depression and anxiety symptoms were caused by his recent divorce from his wife and his
08 new baby with his fiancée. But in July 2008, Plaintiff reported that his depression was
09 attributable to a 1993 car accident and his 2006 burn injuries, even though Plaintiff's work
10 history shows that he returned to work after the car accident and was able to work as a chef
11 until he injured his hand in 2004. In September 2008, Plaintiff reported that he had worked as
12 a chef until four years prior, when he could no longer work due to chronic back spasms and
13 carpal tunnel syndrome (with no mention of mental-health symptoms contributing to inability
14 to work).

15 While not all of these inconsistencies may not undermine Plaintiff's credibility —
16 Plaintiff's inability to remember his birthday or interpret a proverb at various points in time,
17 for example, may not reflect inaccurate reporting but may instead reflect untreated mental
18 impairments — the inconsistent reporting of Plaintiff's drug use is a clear and convincing
19 reason to discount Plaintiff's credibility. Though Plaintiff points to hearing testimony (AR
20 76) to argue that the ALJ misled Plaintiff into believing that his drug use was not relevant to a
21 disability determination, it is not Plaintiff's drug use *per se* that undermines his credibility, it
22 is his inaccurate reporting of his drug use that undermines his veracity. *See Thomas*, 278 F.3d

01 at 959.

02 Inconsistency Between Plaintiff's Reported Symptoms and Plaintiff's Reported
03 Activities

04 The ALJ noted that on several occasions, medical providers observed Plaintiff to have
05 "very dirty" hands or cut and scraped hands, and that Plaintiff explained that he had been
06 using his hands to work on automobiles and dig for rocks. (AR 38 (citing AR 390, 444,
07 446).) Though Plaintiff elsewhere claimed limited ability to use his hands due to pain,
08 tingling, and a propensity to drop items (see, *e.g.*, AR 432), his self-described activities
09 undermine the credibility of that complaint. Accordingly, this is a clear and convincing
10 reason to discount Plaintiff's credibility.

11 In sum, because the ALJ provided multiple clear and convincing reasons to discount
12 Plaintiff's credibility, the Court should affirm the ALJ's adverse credibility determination.

13 **Medical Opinions**

14 Plaintiff contends that the reasons the ALJ provided for discounting the opinions of
15 certain physicians were not specific or legitimate, and that the ALJ emphasized certain
16 evidence over other evidence without acknowledging the context in which the opinions were
17 provided.

18 **Legal Standards**

19 In general, more weight should be given to the opinion of a treating physician than to a
20 non-treating physician, and more weight to the opinion of an examining physician than to a
21 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not
22 contradicted by another physician, a treating or examining physician's opinion may be

01 rejected only for ““clear and convincing”” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d
 02 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician’s opinion
 03 may not be rejected without ““specific and legitimate reasons’ supported by substantial
 04 evidence in the record for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499,
 05 502 (9th Cir. 1983)). The ALJ may reject physicians’ opinions “by setting out a detailed and
 06 thorough summary of the facts and conflicting clinical evidence, stating his interpretation
 07 thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing
 08 *Magallanes*, 881 F.2d at 751). Rather than merely stating her conclusions, the ALJ “must set
 09 forth [her] own interpretations and explain why they, rather than the doctors’, are correct.” *Id.*
 10 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

11 Dr. Dean’s Opinions

12 The ALJ summarized Dr. Dean’s opinions and explained why he did not assign
 13 significant weight to them:

14 In his April 2007 consultative examination, Dr. Dean opined that the claimant
 15 was without limitation as to the number of hours that he could stand, walk, or
 16 sit. He opined that the claimant could lift and/or carry 10 pounds frequently
 17 and occasionally secondary to right wrist tendonitis and left shoulder injury,
 18 which he stated resulted in decreased range of motion and pain for the claimant
 19 ([AR 385]). I do not give significant weight to the lifting and carrying
 20 limitations assessed by Dr. Dean for several reasons. First, he noted only
 21 mildly decreased range of motion on physical examination, suggesting that the
 22 limitation may be based in part on the claimant’s subjective reports, which are
 not fully credible. In addition, Dr. Dean noted that the claimant had “dirt
 encrusted in both his right and left hand equally”[,] indicated that the claimant
 had been employing his right arm for strenuous activity such as digging with
 his hands ([AR 385]), [] which is not consistent with significant lifting and
 carrying limitations. Further, I do not give significant weight to Dr. Dean’s
 conclusion that the claimant’s reported photosensitivity would result in visual
 and environmental limitations, or that his depression would further exacerbate
 his limitations, because the claimant’s alleged photosensitivity is subjective

01 and because Dr. Dean did not perform any significant mental status
 02 examination testing that would support the existence of any concentration
 03 limitations.

04 (AR 38.) Plaintiff argues that the ALJ should not have discounted Dr. Dean's opinions due to
 05 reliance on Plaintiff's self-report, because Dr. Dean did not find Plaintiff's self-report to lack
 06 credibility and he supported his opinions with his own observations. Plaintiff also contends
 07 that because Dr. Dean was aware of Plaintiff's dirty hands and yet still opined that Plaintiff
 08 had lifting and carrying limitations, the ALJ should not have found any inconsistency. Lastly,
 09 Plaintiff argues that the ALJ erred in discounting Dr. Dean's opinions regarding his visual and
 10 environmental limitations, and that the ALJ should have found Plaintiff more limited in that
 11 regard.

12 None of Plaintiff's arguments should prevail. As to the first and third reasons
 13 provided by the ALJ — reliance on Plaintiff's self-report and lack of independent testing —
 14 Dr. Dean did not provide any independent observations to support his conclusion that Plaintiff
 15 suffered from "significant photosensitivity" or that his concentration deficits would
 16 exacerbate his limitations. (AR 386.) Dr. Dean apparently relied on Plaintiff's self-report and
 17 his decision to wear sunglasses during the entire evaluation in reaching these conclusions (AR
 18 382-83). As explained *supra*, the ALJ properly discounted the credibility of Plaintiff's self-
 19 report. Because Dr. Dean did not support his opinions regarding photosensitivity and
 20 concentration deficits with his own independent observations, the ALJ did not err in
 21 discounting that opinion because it presumably relied primarily on Plaintiff's non-credible
 22 self-report. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008).

As to the second reason provided by the ALJ — the inconsistency between Plaintiff's

01 use of his hands (as evidenced by dirt encrusted in both of his hands) and Dr. Dean's carrying
 02 and lifting restriction to 10 pounds — the ALJ properly found that Dr. Dean's range-of-
 03 motion testing (AR 385) revealed only mild limitation and does not support Dr. Dean's more
 04 severe restriction to lifting or carrying no more than 10 pounds. As support for that
 05 restriction, Dr. Dean also cited Plaintiff's report of "significant pain" in his right wrist and left
 06 shoulder, but as explained in the previous section, the ALJ properly discounted Plaintiff's
 07 self-report. Accordingly, because Dr. Dean's independent testing does not support his
 08 opinion regarding the severe lifting/carrying restriction, the ALJ did not err in discounting Dr.
 09 Dean's opinion to the extent that it relied on Plaintiff's non-credible self-report. *See*
 10 *Tommasetti*, 533 F.3d at 1041.

11 Accordingly, the Court should conclude that the ALJ provided specific and legitimate
 12 reasons to discount Dr. Dean's opinions regarding Plaintiff's ability to lift and carry, and
 13 Plaintiff's limitations regarding photosensitivity and concentration.

14 Dr. Cheng-Shannon's Opinions

15 The ALJ declined to give significant weight to the opinions of consultative examiner
 16 Jennifer Cheng-Shannon, M.D.:

17 In April 2007, consultative examiner Dr. Cheng-Shannon stated that the
 18 claimant presented with deficits in cognitive functioning, including short[-] and long-term memory, working memory, and other executive functioning
 19 skills most likely secondary to his head injury and possibly his alcohol use. She opined that these "greatly impacted his ability to function." Dr. Cheng-
 20 Shannon also noted the claimant's "significant mood symptoms" but stated that the exact nature was unclear, and noted that his current substance abuse
 21 made his symptoms difficult to fully assess. Dr. Cheng-Shannon opined that the claimant would likely have difficulty performing even simple and
 22 repetitive tasks, given his immediate memory difficulties and difficulty with a three-step command. She stated that the claimant would most likely have

01 difficulty performing work activities on a consistent basis given the memory
 02 deficits shown on examination. I do not find this opinion persuasive for
 03 several reasons. First, records show that the claimant did not receive mental
 04 health treatment until September 2007, after which he reported significant
 05 improvement in his symptoms with medication ([AR 516-536]). Second, the
 06 doctor's opinion was based entirely on the claimant's subjective reports and
 07 presentation, which are not fully credible, as discussed above. In addition, the
 08 claimant's performance on mental status examination was inconsistent with
 09 other exams found in the record. Moreover, Dr. Cheng-Shannon assigned a
 10 global assessment of functioning (GAF) score of 60, indicating at most
 11 moderate symptoms or moderate difficulty in social or occupational
 12 functioning, which is not consistent with her opinion. For all of these reasons,
 13 this opinion is not given significant weight.

14 (AR 39.) Plaintiff contends that, contrary to the ALJ's findings, Dr. Cheng-Shannon did
 15 support her opinion with independent objective observations (and did not simply rely on
 16 Plaintiff's self-report) and the fact that her mental status examination departs from other
 17 examination results does not undermine the reliability of Dr. Cheng-Shannon's examination.

18 Plaintiff's arguments do not address the ALJ's first reason for discounting Dr. Cheng-
 19 Shannon's opinions about Plaintiff's mental functioning: Plaintiff reported significant
 20 improvement after September 2007, once he began mental-health treatment. (AR 39 (citing
 21 AR 516-36).) Impairments that can be controlled via medication are not disabling, and thus
 22 the ALJ did not err in finding that Plaintiff's subsequent improvement rendered Dr. Cheng-
 23 Shannon's opinions less persuasive. *See Warre v. Comm'r of Social Sec. Admin.*, 439 F.3d
 24 1001, 1006 (9th Cir. 2006).

25 Plaintiff also fails to address the inconsistency between Dr. Cheng-Shannon's
 26 assignation of a GAF score of 60 and her opinions that Plaintiff would have difficulty
 27 performing even simple and repetitive tasks on a consistent basis. Such an internal
 28 inconsistency is a valid reason to discount a medical opinion. *See Morgan*, 169 F.3d at 603.

01 Accordingly, because the ALJ provided at least two valid reasons to discount Dr.
02 Cheng-Shannon's opinions, the Plaintiff has not established error.

03 Dr. Bremer's Opinions

04 The ALJ declined to give significant weight to the opinions of Jeffrey Bremer, Ph.D.:

05 In his October 2007 DSHS evaluation, Dr. Bremer assessed moderate
06 limitations in the claimant's ability to understand, remember, and follow
07 complex instructions; to learn new tasks; and mild to moderate limitations in
08 his ability to perform routine tasks. As to social functioning, Dr. Bremer
09 assessed marked limitations in the claimant's ability to relate appropriately to
10 co-workers and supervisors, marked to severe limitations in his ability to
11 control physical or motor movements and maintain appropriate behavior, and
12 severe limitations in his ability to interact appropriately in public contacts and
13 to respond appropriately to and tolerate the pressure and expectations of a
14 normal work setting ([AR 423]). These limitations are not entirely persuasive
15 and are not given significant weight for several reasons. First, the cognitive
16 limitations assessed were based primarily on the claimant's subjective reports,
17 as evidenced by the support cited by Dr. Bremer that the claimant reported
18 feeling "lost with poor memory, attention, and concentration." Although the
19 mental status examination revealed some difficulty with serial seven
20 subtractions and recall, findings are consistent with an ability to perform
21 simple, repetitive tasks ([AR 425]). Dr. Bremer's report does not contain
22 adequate support for the social limitations he assessed, particularly when
considered in connection with the record as a whole, which documents the
claimant's repeatedly appropriately interpersonal interactions, indicating that
the limitations were based largely on the claimant's subjective reports, which
are not fully credible for the reasons discussed above.

17 (AR 39-40.) Plaintiff argues that the ALJ erred in discounting Dr. Bremer's opinions to the
18 extent that they relied on Plaintiff's self-report, and that Dr. Bremer's opinions are not
19 contradicted by "the record as a whole."

20 While a general reference to contradiction in "the record as a whole" may not be
21 sufficiently specific to justify discounting Dr. Bremer's opinions, the lack of independent
22 corroboration in Dr. Bremer's evaluation notes does constitute a valid reason to do so. All of

01 the evaluation notes supporting the “marked” and “severe” ratings Dr. Bremer assigned as to
 02 Plaintiff’s social functioning merely record Plaintiff’s self-report: “Highly reclusive. Poor
 03 stress response. Highly fearful and avoidant. Many specific ‘triggers’ relating to traumatic
 04 past.” (AR 423.) The notes supporting the opinions as to Plaintiff’s cognitive functioning are
 05 no more independent or objective: “Reports feeling ‘lost’ with poor memory, attention and
 06 concentration.” (AR 423.) Because the ALJ properly discounted Plaintiff’s credibility, as
 07 explained above, Dr. Bremer’s opinions are properly discounted to the extent they rely on
 08 Plaintiff’s self-report because they are not supported by his independent observations. *See*
 09 *Tommasetti*, 533 F.3d at 1041.

10 Dr. Arenas’s Opinions

11 The ALJ declined to give significant weight to the opinions of consultative examiner
 12 Silverio Arenas, Ph.D.:

13 Consultative examiner Dr. Arenas opined that the claimant’s abilities to reason
 14 and understand, attend/concentrate, remember, pace, persist, and to tolerate
 15 stress were all “adequately functional relative to the presenting problems,
 16 within his present limited/curtailed interactive environment, but would be
 17 dysfunctional outside of that, as in any competitive work situation.” Dr.
 18 Arenas assigned a GAF score of 50, indicating serious symptoms or serious
 19 difficulty in social or occupational functioning ([AR 489]). After considering
 20 the entire record, I decline to give Dr. Arenas’ opinion significant weight for
 21 several reasons. First, as noted above, the claimant’s reports to Dr. Arenas
 22 were inconsistent with others found in the record, which renders his subjective
 23 reports less reliable. Second, there are not longitudinal records to support the
 24 limitations assessed by Dr. Arenas. In addition, mental status examination
 25 findings, while consistent with the ability to perform simple, routine work, do
 26 not support the extent of the limitations assessed. Given the lack of
 27 corroborating findings, it appears that Dr. Arenas relied on the claimant’s
 28 subjective reports, which render the assessed limitations less persuasive.

29
 30 (AR 40-41.) Plaintiff contends that the ALJ erred in finding that Dr. Arenas’s opinions were

01 based on Plaintiff's non-credible self-report and that they were inconsistent with other
02 medical opinions.

03 To some degree, Dr. Arenas's evaluation reflects Plaintiff's self-report, such as the
04 description of Plaintiff's mental-health history and daily activities. (AR 485, 87-88.) As
05 explained above, because the ALJ properly discounted Plaintiff's credibility, Dr. Arenas's
06 opinions are properly discounted to the extent they rely on Plaintiff's self-report. *See*
07 *Tommasetti*, 533 F.3d at 1041.

08 And to the extent that Dr. Arenas opined that Plaintiff's depression and anxiety
09 symptoms were disabling, those opinions are contradicted by treatment notes showing that
10 those symptoms were well-controlled with Prozac but sometimes remained untreated. *See*,
11 *e.g.*, AR 520. Dr. Arenas's mental status examination itself revealed adequate judgment,
12 abstraction, remote memory, attitude, thought content, and thought flow. (AR 486-87.) To
13 the extent that it also revealed some memory deficits, it was not necessarily inconsistent with
14 the ALJ's assessment that Plaintiff was capable of completing simple tasks. *Compare* AR
15 489 *with* AR 31. Thus, Plaintiff has not shown that the ALJ erred in discounting Dr. Arenas's
16 opinions.

17 Dr. Meka's Opinions

18 The ALJ assigned "very little weight" to the December 2007 opinions of Plaintiff's
19 primary care physician, Srinivasa Meka, M.D.:

20 Primary care physician Dr. Meka completed a DSHS evaluation in December
21 2007 in which he opined that the claimant's chronic back pain, headaches, and
22 depression rendered him "severely limited" ([AR 523]). This assessment is
given very little weight for several reasons. First, "severely limited" is defined
as "unable to lift at least two pounds or unable to stand and/or walk" ([AR

523]). There is simply no support for such severe limitations, and Dr. Meka's assessment is so extreme as to render it implausible. Second, Dr. Meka's treatment records do not contain any objective support for significant limitations. As noted above, the claimant told Dr. Meka that he had back pain in the past that was well controlled, and failed to report any upper extremity problems; the record fails to document any significant back impairment. Finally, Dr. Meka is a primary care physician, and as such, is not qualified to opine regarding the claimant's psychiatric functioning. For all these reasons, this unsupported and inconsistent opinion is given very little weight.

(AR 39.) Plaintiff argues that Dr. Meka, as a primary care physician, was qualified to assess and treat both physical and mental disorders, and that, contrary to the ALJ's decision, the medical record is replete with references to Plaintiff's depression symptoms.

Dr. Meka's qualifications may not have been an entirely proper reason to discount his opinions regarding Plaintiff's mental disorders (see *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)), but the contradictory evidence in Dr. Meka's treatment records is a specific and legitimate reason to do so. For example, Dr. Meka noted that Plaintiff's depression was "well controlled" by Prozac in the past and he prescribed the medication again in September 2007. (AR 531-32.) Dr. Meka's evaluation itself notes that Plaintiff receives "moderate relief" on Prozac, and yet Dr. Meka opined that Plaintiff's depression was "severe." (AR 522-23.) Plaintiff also visited Dr. Meka multiple times reporting no back pain (AR 525-30) or "well-controlled" back pain (AR 531), and yet Dr. Meka opined that Plaintiff experienced "marked" back pain (AR 523). Because Dr. Meka's treatment records contradict his extreme opinions about Plaintiff's ability to function, the ALJ properly discounted Dr. Meka's opinions. See *Batson v. Comm'r of Social Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (holding that an ALJ may discredit a medical opinion that is, *inter alia*, unsupported by objective medical findings).

01 State Agency Consultants' Opinions Regarding Plaintiff's Ability to Handle Stress

02 The ALJ gave "significant weight" to the opinions of the State agency psychologist
03 consultants, as quoted in relevant part:

04 As to the claimant's mental functioning, I have given significant weight to the
05 opinions of State agency psychologist consultants who found that the claimant
06 . . . would do best with the reduced stress of a predictable routine ([AR 403-
07 406, 466-469, 493]). The State agency assessments are consistent with the
08 record considered as a whole, including treatment records and the claimant's
09 documented activities; therefore, they are given significant weight.

10 (AR 39.) Plaintiff contends that even though the ALJ purported to give significant weight to
11 the psychological consultants' opinion that Plaintiff had limitations in handling stress, the
12 ALJ's RFC assessment does not account for any such limitations.

13 As the Commissioner contends, however, the ALJ's RFC assessment does include a
14 number of limitations that reduce Plaintiff's stress, such as the limitation to simple
15 instructions and only incidental contact with the public. Furthermore, despite the agency
16 consultants' opinions about how Plaintiff would "do best" with reduced stress, the consultants
17 nonetheless found Plaintiff capable of performing simple tasks. Because the ALJ's RFC
18 assessment is consistent with the agency consultants' opinions, Plaintiff has failed to allege
19 error. *See Turner v. Comm'r of Social Sec. Admin.*, 613 F.3d 1217, 1222-23 (9th Cir. 2010).

20 Lay Witness Evidence

21 The record contains a May 2010 written statement from Plaintiff's then-girlfriend Erin
22 Backa. (AR 300.) Ms. Backa describes Plaintiff's headaches, right wrist pain, difficulty
concentrating, and social limitations. The ALJ considered Ms. Backa's statement, but found
that it was not probative as to disability because it relied on Plaintiff's complaints and because

01 it could not “outweigh the analysis of the objective medical findings, opinion evidence, and
 02 the claimant’s overall functional abilities.” (AR 41.) Plaintiff contends these reasons are not
 03 germane.

04 Legal Standards

05 Lay witness testimony as to a claimant’s symptoms or how an impairment affects
 06 ability to work is competent evidence and cannot be disregarded without comment. *Van*
 07 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of
 08 lay witnesses only upon giving germane reasons. *Smolen v. Chater*, 80 F.3d 1273, 1288-89
 09 (9th Cir. 1996) (finding rejection of testimony of family members because, *inter alia*, they
 10 were ““understandably advocates, and biased”” amounted to “wholesale dismissal of the
 11 testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane
 12 to each individual who testified.”) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
 13 1993)).

14 However, the failure to disregard lay testimony without comment may be deemed
 15 harmless. An error is harmless where it is ““inconsequential to the ultimate nondisability
 16 determination.”” *Molina v. Astrue*, 674 F.3d 1104, 1122 (9th Cir. 2012) (quoting *Stout v.*
 17 *Comm’r, Social Sec. Admin.*, 454 F.3d 1050 1055 (9th Cir. 2006)). As recently held by the
 18 Ninth Circuit, ““an ALJ’s failure to comment upon lay witness testimony is harmless where
 19 ‘the same evidence that the ALJ referred to in discrediting [the claimant’s] claims also
 20 discredits [the laywitness’s] claims.”” *Id.* at 1122 (quoting *Buckner v. Astrue*, 646 F.3d 549,
 21 560 (8th Cir. 2011); also describing harmless error as occurring where an “ALJ’s well-
 22 supported reasons for rejecting the claimant’s testimony apply equally well to the lay witness

01 testimony[.]”)

02 Ms. Backa’s Statement

03 Though Plaintiff contends that Ms. Backa’s statement describes her own observations,
04 and thus should not be discounted for reliance on Plaintiff’s self-report, it was reasonable for
05 the ALJ to find that Ms. Backa’s statement was not particularly relevant, in light of Plaintiff’s
06 failure to follow treatment recommendations and the medical testing showing that Plaintiff’s
07 wrist symptoms were not as severe as Plaintiff described. Those reasons, which the ALJ
08 stated in discounting Plaintiff’s credibility, are germane to Ms. Backa’s statement as well.

09 The ALJ’s other statement, regarding the relative weight of lay testimony and medical
10 evidence, is superfluous to his analysis and not a germane reason to discount Ms. Backa’s
11 statement. As Plaintiff notes, even he does not “expect Ms. Backa’s testimony to outweigh
12 any other evidence. He expected it to be considered along with the other evidence.” Dkt. 19
13 at 23. But that is precisely what the ALJ did: he explicitly stated that he “considered” Ms.
14 Backa’s statement, and ultimately found it to be of less value for the germane reasons
15 explained in the previous paragraph. Because the ALJ explicitly considered and provided a
16 valid reason to discount Ms. Backa’s statement, the ALJ did not err.

17 Step Five

18 Plaintiff contends that the ALJ’s step-five findings are not supported by substantial
19 evidence, but his argument merely reiterates arguments raised and rejected *supra* (that the
20 ALJ improperly rejected medical opinions). *See* Dkt. 19 at 23; Dkt. 23 at 21. Accordingly,
21 Plaintiff failed to establish error at step five.

22 / / /

CONCLUSION

For the reasons set forth above, this matter should be AFFIRMED.

DATED this 13th day of November, 2012.

Mary Alice Theiler
Mary Alice Theiler
United States Magistrate Judge